Supreme Court, U.S.
F I L E D
APR 5 1991
OFFICE OF THE CLERK

(1)

90-1542

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARTHOLOMEW RIVIECCIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Alan M. Dershowitz
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, NY 10007
(212) 513-7676

Victoria B. Eiger
Of Counsel

QUESTIONS PRESENTED FOR REVIEW

I. Whether the government may use a witness's immunized testimony to obtain an indictment against the witness as long as it does not use the immunized testimony at his trial.

II. Whether the government may make indirect use of immunized testimony at trial, for example, to shape and focus the questioning of witnesses.

PARTIES TO THE PROCEEDING IN THE COURT WHERE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties in the court below were Bartholomew Rivieccio, defendant-appellant, and the United States of America, appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES TO THE PROCEEDING IN THE COURT WHERE JUDGMENT IS SOUGHT TO BE REVIEWED.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....vii

JURISDICTION OF THIS COURT.....vii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....viii

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....3

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' RULING PERMITTING THE PROSECUTION TO USE IMMUNIZED TESTIMONY TO SECURE AN INDICTMENT OF THE IMMUNIZED WITNESS CONFLICTS WITH RULINGS OF THIS COURT AND OF AT LEAST FIVE OTHER CIRCUITS, AND WILL CREATE CHAOS IN THE CRIMINAL JUSTICE SYSTEM.....11

II. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHETHER THE PROSECUTION MAY PROPERLY MAKE INDIRECT USE OF IMMUNIZED TESTIMONY TO SHAPE AND FOCUS THE

QUESTIONING OF WITNESSES
OR TO SHAPE THE
PROSECUTION'S THOUGHT
PROCESSES IN
PREPARING THE INDICTMENT
AND PREPARING FOR
TRIAL.....27

CONCLUSION.....30

APPENDIX

Opinion of the United
States Court of Appeals
for the Second Circuit
(November 2, 1990).....A-1

Opinion of the United
States District Court for
the Eastern District of
New York
(September 5, 1989).....A-14

Judgment of the United
States Court of Appeals
for the Second Circuit
(November 2, 1990).....A-62

Order of the United
States Court of Appeals
for the Second Circuit
denying rehearing
(January 8, 1991).....A-64

TABLE OF AUTHORITIES

Counselman v. Hitchcock,
142 U.S. 547 (1892) 16

Kastigar v. United States,
406 U.S. 441 (1972) .....passim

Lawn v. United States,
355 U.S. 339 (1958) 22

Midland Asphalt Corp.
v. United States,
489 U.S. 794 (1989) 22

Murphy v. Waterfront
Commission,
378 U.S. 52 (1964) 15

New Jersey v. Potash,
440 U.S. 450 (1979) 25

Nix v. Whiteside,
475 U.S. 157 (1986) 25

Ullman v. United States,
350 U.S. 422 (1956. 23

United States v. Beery,
678 F.2d 856 (10th Cir. 1982),
cert. denied,
471 U.S. 1066 (1985).....19

United States v. Blue,
384 U.S. 251 (1966) 22

United States v. Calandra,
414 U.S. 338 (1974) 22,23

United States v. Garrett,
797 F.2d 656
(8th Cir. 1986).....19

United States v. Hampton,
775 F.2d 1479
(11th Cir. 1985) 19

United States v. Hinton,
543 F.2d 1002 (2d Cir.
1976),
cert. denied,
429 U.S. 980 (1977) 20

United States v. Marini,
851 F.2d 595 (2d Cir. 1988),
cert. denied,
109 S.Ct. 1654 (1989) 7, 27

United States v. McDaniel,
482 F.2d 305
(8th Cir. 1973).....28

United States v. Mechanik,
475 U.S. 66 (1986) 8,9

United States v. North,
910 F.2d 843
(D.C. Cir. 1990),
rehearing denied in part
and granted in part,
920 F.2d 940
(D.C. Cir. 1990).....18,23,28

United States v. Palumbo,
897 F.2d 245
(7th Cir. 1990) 18

United States v. Semkiw,
712 F.2d 891
(3d Cir. 1983).....28

United States v. Zielezinski,
740 F.2d 727
(9th Cir. 1984).....19

STATUTES

18 U.S.C. §6002 .....passim

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 919 F.2d 812, and is set forth in the appendix at A-1. The opinion of the United States District Court for the Eastern District of New York is reported at 723 F.Supp. 867, and is reproduced in the appendix at A-14.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit was entered on November 2, 1990. (A-62) The petition for rehearing was denied by order entered on January 8, 1991. (A-64) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The federal use immunity statute, 18 U.S.C. §6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in

any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

The primary issue in this case is whether prosecutors may present a defendant's immunized testimony to a grand jury in order to obtain a grand jury indictment against him, as long as they do not present the tainted evidence to the petit jury at defendant's trial.[1] The Court of Appeals held that they may, ruling that, when the government uses immunized testimony before a grand jury to obtain an indictment, the only remedy for the violation is suppression of the tainted evidence at trial, if the government uses such evidence.

The Second Circuit's holding conflicts with rulings in at least five other Circuits and runs directly

---

[1] The case also presents the question whether the government may make indirect use of immunized testimony at trial, for example, to shape and focus the questioning of trial witnesses. See infra at 27.

contrary to what all criminal lawyers have long assumed to be fundamental black letter law: that testimony given under a grant of immunity cannot be used to indict the immunized witness. The Second Circuit's decision means that immunized testimony may be used -- directly and indirectly -- to obtain an indictment, without violating the Constitution or 18 U.S.C. §6002. Until this issue is resolved by this Court, responsible counsel must advise their clients not to testify, even when granted immunity, because the protection of §6002 is no longer co-extensive with the longstanding understanding of the scope of the Fifth Amendment's protection. This case thus raises the most significant Fifth Amendment question since Kastigar itself. It is in the interests of both the defense and the prosecution bar -- as well as the orderly administration

of justice -- that this Court grant review and authoritatively resolve this issue now.

STATEMENT OF FACTS

Petitioner Bartholomew Rivieccio was convicted of federal offenses arising from his role in a scheme to defraud the HYFIN credit union, and Chemical Bank, by inducing them to finance the purchase and rehabilitation of buildings in Brooklyn by 16 realty corporations in which he had an interest. Rivieccio obtained improper loans from HYFIN with the assistance of corrupt HYFIN officers, including HYFIN's treasurer, Edmund Lee, who, in exchange for making the loans, received shares in the corporations holding the real property which was purchased with the borrowed funds. After HYFIN ceased to lend him money, Rivieccio turned to Chemical Bank, which he defrauded by obtaining loans without disclosing his

multi-million dollar indebtedness to HYFIN. The scheme came to light in April of 1986 when Arnold Kramer, an employee of the credit union, went to the United States Attorney and, in exchange for a no-prosecution agreement, told a tale of financial wrongdoing at HYFIN.

On April 5, 1986, armed with a search warrant, state and federal agents raided HYFIN's offices, and seized numerous records. Within days, federal agents obtained a search warrant for Rivieccio's offices. The search, however, produced little information concerning any link between Rivieccio and/or his businesses, and Edmund Lee and/or HYFIN. The United States Attorney's office served 16 grand jury subpoenas upon the Petitioner, requiring production of all documents of the real estate corporations which were alleged to have

had tainted links with HYFIN. Asserting the Fifth Amendment privilege, Rivieccio declined to produce the documents.

The government chose to grant immunity to the Petitioner under 18 U.S.C. §6002, and, in June of 1987, Rivieccio's attorneys produced the subpoenaed documents. Rivieccio himself was called before the grand jury for the ostensible purpose of authenticating the corporations' records. Petitioner, with his grant of immunity, was put before the grand jury on three occasions -- July 2, July 9, and September 10, 1987. As the Court of Appeals acknowledged, the Assistant United States Attorney's questions to him went well beyond identification or authentication of the corporate records. (A-4) According to the Court of Appeals, Rivieccio "answered questions pertaining to, inter alia,

the preparation of the documents, the ownership and operation of the real estate corporations, and the identity of his associates in the project...." (A-4-5)

On February 1, 1988, a new federal grand jury was impanelled. On May 5, 1988, it voted an indictment against Petitioner. Two superseding indictments were voted by that grand jury, the second of which contained the charges upon which Rivieccio stood trial.

Before trial, Rivieccio moved to dismiss the superseding indictment on the ground that the indictment was based upon the immunized testimony he had given the grand jury and sought a Kastigar hearing. He claimed, as well, that the government's trial case was based on the immunized testimony he gave.

Following a post-trial Kastigar

hearing,[2] the district court concluded that the government had demonstrated an independent source for all the evidence introduced at trial.[3]

The district court did not find that the immunized testimony had not been used to obtain the indictment or that the evidence introduced in the grand jury had an independent source. It held instead that the

---

[2] At that hearing, case agent Anthony Valenti testified. The court also received affidavits of AUSA Nicholas DeFeis, who conducted the grand jury presentation in which Rivieccio did not testify, and the trial. DeFeis indicated that he had read one volume of Rivieccio's immunized testimony, and had glanced at another, but that he had not read the transcript of the July 2 appearance, which contained the most substantial aspects of Rivieccio's testimony. DeFeis stated that he did not present the transcripts of Petitioner's immunized testimony to the grand jury which returned the indictment.

[3] It further held that Petitioner's claims of indirect use were foreclosed by United States v. Mariani, 851 F.2d 595 (2d Cir. 1988), cert. denied, __ U.S. __, 109 S.Ct. 1654 (1989). (A-24)

indictment was valid even if it rested on evidence obtained in violation of the privilege against self-incrimination, and that the suppression of the defendant's compelled testimony at trial is all that the Self-Incrimination Clause or §6002 requires. (A-26-36) Alternatively, based on United States v. Mechanik, 475 U.S. 66 (1986), the district court held that, in light of the petit jury's guilty verdict, any error in the grand jury proceeding was harmless beyond a reasonable doubt. (A-42-61)

The Court of Appeals affirmed. It expressly assumed that the government had misused Petitioner's immunized testimony to secure the indictment. (A-9-10) It held, however, that a facially valid indictment may not be challenged on the ground that the grand jury heard immunized testimony or otherwise tainted evidence. (A-10)

According to the Court, absent exceptional circumstances,[4] the only remedy available for use of immunized testimony before a grand jury is suppression of the tainted evidence at trial. (A-11) If no tainted evidence is used at trial, no remedy exists at all.[5] (A-12-14)

The Court of Appeals also held that the government's use of immunized testimony to shape and focus questioning of trial witnesses or

---

[4] The Court of Appeals reaffirmed the validity of its decisions holding that dismissal of the indictment is appropriate or mandatory when the defendant testifies under immunity before the same grand jury which returns the indictment, when the transcript of the immunized testimony is placed before the indicting grand jury, or when the government concedes that the indictment rests almost exclusively on tainted evidence. (A-11, n.4)

[5] The Court of Appeals expressly declined to offer any opinion on the district court's alternative ground for denial of the motion to dismiss, based on United States v. Mechanik. (A-12, n.5).

otherwise prepare for trial is not proscribed by Kastigar.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' RULING PERMITTING THE PROSECUTION TO USE IMMUNIZED TESTIMONY TO SECURE AN INDICTMENT OF THE IMMUNIZED WITNESS CONFLICTS WITH RULINGS OF THIS COURT AND OF AT LEAST FIVE OTHER CIRCUITS, AND WILL CREATE CHAOS IN THE CRIMINAL JUSTICE SYSTEM

The question presented by this case is of critical importance to the investigation and prosecution of crimes, not only in the federal system, but in the states' criminal justice systems as well. Until the Second Circuit's decision, it seemed beyond question that the Constitution did not permit a prosecutor to obtain an indictment against a witness using testimony that witness gave under the compulsion of a grant of use and derivative use immunity. The Second Circuit has now held that neither §6002 nor the Fifth Amendment prohibits a prosecutor from using a witness's immunized grand jury testimony to

obtain an indictment against the witness.

Until the question whether immunized testimony may be used to obtain an indictment against the immunized witness is resolved by this Court, all competent defense attorneys will be compelled to advise their clients to refuse to testify even after a grant of immunity. (Indeed, failure to do so may itself now raise questions regarding the competence of counsel.) Prudent clients will follow this advice. At the same time, rational prosecutors will place all potential defendants before the grand jury, under immunity grants, making sure only that Chinese Wall procedures are in place to insure that the witness's immunized testimony is not used, directly or indirectly, as evidence <u>at trial</u>. The cumulative result will be a flooding of the lower courts with litigation,

including contempt proceedings, arising from prosecutors' efforts to compel testimony under immunity grants, over witnesses' claims that, unless the immunity grant guarantees that the testimony will not be used to obtain an indictment, it is not co-extensive with the Fifth Amendment, and thus not sufficient to supplant the Fifth Amendment privilege. Petitioner submits that no witness could now be held in contempt for refusing to testify although granted immunity; every witness would have a good faith basis for declining to answer questions, given the Second Circuit's ruling in this case. Until certainty is restored by a decision of this Court, the prosecutors' ability to use immunity grants as an investigatory tool will remain seriously compromised. The need for a prompt decision by this Court is manifest.

Petitioner submits that the decision of the Court of Appeals for the Second Circuit cannot be squared with this Court's Fifth Amendment rulings.

The federal use immunity statute, 18 U.S.C. §6002 (1982), provides that no testimony or other information which a witness is compelled to disclose to the grand jury under the immunity order may be used against him, directly or indirectly, in a criminal case, except a prosecution for perjury. In Kastigar v. United States, 406 U.S. 441 (1972), this Court held that compelling testimony from a grand jury witness granted use and derivative use immunity does not violate the witness's Fifth Amendment privilege against self incrimination, because the immunity conferred by §6002 is co-extensive with the scope of the Fifth Amendment privilege. Rejecting the argument that

full transactional immunity was necessary, this Court wrote:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

406 U.S. at 453 (emphasis in original).

The immunity leaves the witness "in substantially the same position" as if he had claimed the privilege and thus is sufficient to supplant the privilege. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

Notwithstanding Kastigar's broad language and underlying rationale, the Court of Appeals has read that decision

to proscribe only use of the immunized testimony (or evidence derived from it) at trial. The decision leaves the prosecution free to compel testimony and to use it in preliminary proceedings, including the grand jury proceeding itself, to obtain an indictment against the immunized witness. And it does so even though §6002, like the Fifth Amendment itself, refers to "any criminal case," and even though it is long settled that a "criminal case" includes a grand jury proceeding. Counselman v. Hitchcock, 142 U.S. 547 (1892).

It cannot be denied that an immunized witness who is indicted as a result of having given immunized testimony is hardly in the same position as he would have been had he not testified. The indictment against him is a crucial and substantial step leading to the infliction of criminal

penalties. Indeed, given the large proportion of criminal cases which are resolved by plea agreement, rather than by trial, the grand jury's return of an indictment is perhaps a more critical stage in the proceedings leading to infliction of criminal penalties than the trial of those charges itself.

Thus, even under the very narrowest reading of Kastigar -- limiting proscribed uses to "evidentiary" uses -- a proscribed evidentiary use must include evidentiary use before the indicting grand jury, not merely evidentiary use at trial.

A number of federal Courts of Appeals have so held. Just last year, for example, the Seventh Circuit ordered that a conviction entered on a guilty plea be vacated, and an indictment dismissed, where the government failed to establish that it

had not used the information provided to the authorities under a grant of immunity in obtaining an indictment against the defendant. United States v. Palumbo, 987 F.2d 245 (7th Cir. 1990). The Court had no difficulty concluding that "the logic of Kastigar . . . applies to grand jury proceedings as well as trials." Id. at 249.

The District of Columbia Circuit, as well as the Eighth, Ninth, Tenth, and Eleventh Circuits, have reached the same conclusion. See United States v. North, 910 F.2d 843, 865 (D.C. Cir. 1990) (use of immunized testimony to refresh the memories of grand jury witnesses is an impermissible use; "once immunity is shown, the prosecution has the burden of demonstrating that its use of the immunized testimony has not tainted any aspect of the case up to indictment and will not do so during trial"),

rehearing denied in part and granted in part, 920 F.2d 940, 947-49 (D.C. Cir. 1990); United States v. Garrett, 797 F.2d 656 (8th Cir. 1986); United States v. Zielezinski, 740 F.2d 727 (9th Cir. 1984) (government acknowledged that it was prohibited from using defendant's immunized testimony to obtain an indictment, but claimed that the indictment was based on evidence from independent sources); United States v. Beery, 678 F.2d 856, 863 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985) (unless the error is harmless beyond a reasonable doubt, indictment must be dismissed if there was use or derivative use of immunized testimony before the grand jury); United States v. Hampton, 775 F.2d 1479, 1485 (11th Cir. 1985) (government had the burden of establishing that all of the evidence presented to the grand jury was derived from legitimate,

independent sources).

The Second Circuit's own recognition that a grand jury which hears an immunized witness testify may not thereafter indict him -- a rule announced in United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1977), and reaffirmed in Petitioner's case -- rests expressly on the proposition that "§6002 speaks to any use of immunized testimony in any criminal case, and so prohibits its use not merely at trial, but in the grand jury proceedings as well." 543 F.2d at 1009. No principled reason exists why it would be impermissible for a grand jury which hears the immunized witness testify or is provided with transcripts of the immunized testimony to indict, but entirely proper for it to indict if it does not hear the witness testify or see the transcripts, but is simply told

the contents of the immunized testimony by a witness who has. For these purposes, as Kastigar itself holds, there is no valid distinction between direct or indirect use. Where, for example, the immunized testimony provides investigatory leads or identifies witnesses, which the prosecution then pursues and uses to make its case before the grand jury and to obtain an indictment from it, the immunized witness who has provided these leads and identified the witnesses has hardly been left "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." Kastigar v. United States, 406 U.S. at 462.

To be sure, the duty to testify "may on occasion be burdensome or embarrassing . . . [and] may cause injury to a witness' social and economic status," United States v.

Calandra, 414 U.S. 338, 345 (1974). Until the Second Circuit's decision, however, a witness has never been required to endure the burden, embarrassment or injury of finding himself under indictment as a result of his duty to testify.

In so ruling, the Second Circuit relied upon a line of cases from this Court which it read to stand for the proposition that "an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence, including evidence obtained in violation of the privilege against self-incrimination," citing Midland Asphalt Corp. v. United States, 489 U.S. 794, 800 (1989); United States v. Calandra, 414 U.S. 338, 345 (1974); United States v. Blue, 384 U.S. 251, 255 n.3 (1966); and Lawn v. United

States, 355 U.S. 339, 350 (1958). The cited line of cases, however, mainly involves the Fifth Amendment's grand jury clause, not the Fifth Amendment privilege against self-incrimination. And in Calandra, this Court specifically noted that the grand jury may consider incompetent evidence, "but it may not itself violate a valid privilege." 414 U.S. at 346. See also United States v. North, supra, 920 F.2d at 947-49.

The practical problems which the Second Circuit's decision will necessarily engender can hardly be overstated. The Second Circuit has torn an enormous hole in the fabric of Fifth Amendment jurisprudence and in settled immunity practice. It has transformed the privilege against self-incrimination -- "one of the great landmarks in man's struggle to make himself civilized," Ullman v. United

States, 350 U.S. 422, 426 (1956), into a mere rule of evidence. And it has fundamentally shifted the state-individual balance by making it possible to force an individual to assist the government in obtaining an indictment against him. If such a shift is to take place, it should not happen without this Court's consideration.

There is little doubt that aggressive federal prosecutors will eagerly take advantage of the opportunities presented to them by the Second Circuit's decision, and that state prosecutors will be quick to follow this lead. In fact, a prosecutor would fail to perform his duty if he did not seize the chance to put the defendant before a grand jury, whether or not he has sufficient evidence to obtain an indictment without the defendant's own testimony.

If he has sufficient evidence, immunizing the defendant and forcing him to testify will, at the least, freeze his testimony, and virtually insure that he will not testify at trial. Although his immunized testimony could not be used to impeach him, New Jersey v. Portash, 440 U.S. 450 (1979), his attorney would be reluctant to elicit from him a different, potentially perjurious version at trial, Nix v. Whiteside, 475 U.S. 157 (1986); moreover, any inconsistencies between grand jury and trial testimony could be used as the basis for a perjury prosecution. See 18 U.S.C. §6002.

Where the government does not have enough evidence to indict without the immunized testimony, that will not stop the aggressive prosecutor. That the government will still have to prove its case without the immunized testimony or

evidence derived from it will be a small deterrent at best; negotiated guilty pleas can be expected to outnumber cases where convictions cannot be obtained because the case cannot be made without the tainted evidence. Witnesses -- even those who are not targets -- will have no choice but to assert a Fifth Amendment privilege, even after an immunity grant, and prosecutors will have no way to compel the testimony over that assertion.

The resulting disorder and the fundamental change in the state-individual balance which the Second Circuit's decision ensures merit this Court's prompt attention.

II. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHETHER THE PROSECUTOR MAY PROPERLY MAKE INDIRECT USE OF IMMUNIZED TESTIMONY TO SHAPE AND FOCUS THE QUESTIONING OF WITNESSES OR TO SHAPE THE PROSECUTION'S THOUGHT PROCESSES IN PREPARING THE INDICTMENT AND PREPARING FOR TRIAL.

The Court of Appeals rejected Petitioner's claim that the government had made indirect use of his immunized testimony at trial to shape and focus the questioning of witnesses and in otherwise preparing for trial. (A-8) Reaffirming its decision in United States v. Mariani, 851 F.2d 595 (2d Cir. 1988), cert. denied, __ U.S.__, 109 S.Ct. 1654 (1989), the Court of Appeals held that, to the extent that the government's thought process or questioning of trial witnesses was influenced by Petitioner's immunized testimony, any such uses were "tangential" and, therefore, not prohibited. (A-8-9)

As the Court of Appeals itself recognized, there is a conflict in the Circuits on this point. (A-8, n.3)

The United States Court of Appeals for the Eighth Circuit held, in United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973), that the government would violate the Fifth Amendment if it used immunized testimony "in some significant way short of introducing tainted evidence. . . . Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." 482 F.2d at 311 (citations omitted). The Third Circuit has adopted this reasoning. See United States v. Semkiw, 712 F.2d 891, 895 (3d Cir. 1983). See generally United States v. North, supra, 910 F.2d at

856-60.

Until this Court addresses the issue, prosecutors cannot know which uses of immunized testimony are permitted and which are proscribed and the lower courts will continue to resolve this recurring issue in different and conflicting ways. The conflict in the Circuits makes the issue ripe for, and deserving of, review by this Court.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan M. Dershowitz
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4616

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, NY 10007
(212) 513-7676

Victoria B. Eiger
Of Counsel

April 4, 1991

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1639—August Term, 1989

(Argued: August 17, 1990 Decided: November 2, 1990)

Docket No. 89-1581

UNITED STATES OF AMERICA,

Appellee,

—v.—

BARTHOLOMEW RIVIECCIO,

Defendant-Appellant.

Before:

MINER and ALTIMARI, *Circuit Judges*,
and KELLEHER, *District Judge*.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Edward R. Korman, Judge), convicting defendant of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, mail

* Honorable Robert J. Kelleher, of the United States District Court for the Central District of California, sitting by designation.

fraud in violation of 18 U.S.C. § 1341, bribery of bank officials in violation of 18 U.S.C. § 215, misapplication of credit union funds in violation of 18 U.S.C. § 657, and bank fraud in violation of 18 U.S.C. § 1344.

Affirmed.

JOHN N. CUOMO, New Hyde Park, N.Y., *for Defendant-Appellant.*

NICHOLAS M. DEFEIS, Assistant United States Attorney, Brooklyn, N.Y. (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Matthew E. Fishbein, Peter A. Norling, Assistant United States Attorneys, of counsel), *for Appellee.*

KELLEHER, *District Judge*:

This is an appeal from a judgment of the United States District Court for the Eastern District of New York. A jury convicted Defendant-Appellant Bartholomew Rivieccio ("Appellant") of one count of conspiracy to commit mail fraud (18 U.S.C § 371), ten counts of mail fraud (18 U.S.C § 1341), nine counts of bribery of bank officials (18 U.S.C § 215), one count of misapplication of credit union funds (18 U.S.C § 657), and one count of bank fraud (18 U.S.C § 1344). The district court sentenced him to concurrent five-year terms on each count, payment of restitution, and a special assessment.

On appeal, Appellant claims that the district court erred in failing to dismiss the indictment, arguing that the Government improperly used his immunized testimony, both directly and indirectly, before the Grand Jury that indicted him and at trial. We affirm.

I

Appellant's conviction stems from his role in a scheme to defraud the HYFIN (Help Your Friend in Need) Credit Union ("Credit Union") and Chemical Bank, taking place from 1981 to April 1986. In summary, Appellant fraudulently induced the Credit Union and Chemical Bank into financing the purchase and rehabilitation of buildings located primarily in Brooklyn.

In April 1986, Arnold Kramer, an employee of the Credit Union, began cooperating with Government attorneys in exchange for a no-prosecution agreement. Kramer revealed a scheme in which Appellant's real estate corporations obtained loans from the Credit Union with the assistance of some Credit Union officers. The loans were improper for a variety of reasons. They were unsecured and obtained for the benefit of Appellant's real estate corporations. Under New York banking law, corporations are not entitled to receive loans from credit unions. In addition, the loans exceeded the Credit Union's lending limits and were completed without the necessary paperwork. To obtain the loans, Appellant bribed some Credit Union officers by giving them shares in the corporations holding properties he had purchased.

After Appellant became so deeply in debt that the Credit Union would no longer lend him money, he

applied for and received loans from Chemical Bank without disclosing that he owed several million dollars to the Credit Union.

Pursuant to the information furnished by Kramer, agents of the New York State Banking Department and the United States Attorney's office obtained and executed search warrants for the Credit Union's and Appellant's offices in April 1986. The searches resulted in the seizure of numerous documents and records.

Within weeks, Appellant's accomplices in the scheme agreed to plead guilty to assorted charges arising out of the scheme and to cooperate in the investigation. As part of those plea agreements, the accomplices agreed to be debriefed and to testify at subsequent proceedings.

In June 1987, Appellant's attorneys produced materials subpoenaed by a Grand Jury investigating the financial affairs of the Credit Union. Thereafter, Appellant testified before the Grand Jury on July 2, July 9, and September 10, 1987 after being granted use immunity under 18 U.S.C. § 6002.[1]

The ostensible purpose of Appellant's Grand Jury appearance was to authenticate the documents produced by his attorneys in response to the Grand Jury subpoenas. However, the scope of the questioning extended beyond the mere authentication of records. Specifically, Appellant answered questions pertaining to, *inter alia*, the preparation of the documents, the ownership and operation of the real estate corporations, and the iden-

---

1 Section 6002 provides in relevant part that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." 18 U.S.C § 6002 (1988).

tity of his associates in the project, including that of his accountant, Ralph Strafaci.

On February 1, 1988, a new Grand Jury was impanelled. On May 5, 1988, the new Grand Jury returned an indictment against Appellant. Superseding indictments followed on July 21 and November 3, 1988, the latter being the charge upon which Appellant stood trial. The Government did not present the Grand Jury that indicted Appellant with any of the transcripts of Appellant's immunized testimony before the 1987 Grand Jury.

Before his trial commenced, Appellant moved to dismiss the superseding indictment on the ground that the Government used his immunized testimony against him. The district court deferred the hearing on the motion until after trial.

The testimony of Appellant's former accomplices and numerous documents established the Government's case against Appellant. Appellant rested without putting on a defense.

Following the trial, the district court conducted a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), to determine whether the Government used Appellant's immunized testimony, either directly or indirectly, to procure the indictment and subsequent conviction. The district court concluded that the Government had met its burden of demonstrating that the information used to indict Appellant and the evidence admitted at trial were obtained through legitimate independent sources. Accordingly, the district court denied Appellant's motion. *United States v. Rivieccio*, 723 F. Supp. 867 (E.D.N.Y. 1989). The denial of this motion is the subject of this appeal.

II

The question presented in this appeal is whether the district court erred in denying Appellant's motion to dismiss the indictment. We think not, and for the reasons set forth below, we affirm the judgment of the district court.

III

Appellant raised two issues in his motion to dismiss the indictment, both of which are presented in this appeal. Under *Kastigar*, a defendant "need only show that he or she testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence was derived from legitimate independent sources." 406 U.S. at 461-62.

Appellant claims that the Government made use of his immunized testimony both at trial and before the Grand Jury that returned his indictment. We address each of these claims in turn.

A

The district court found that the Government had demonstrated an independent source for all the evidence introduced at trial. Whether the Government made use of immunized grand jury testimony is an issue of fact, and the district court's findings will not be reversed unless clearly erroneous. *United States v. Gallo*, 863 F.2d 185, 190 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1539 (1989).

At the *Kastigar* hearing, the Appellant conceded that all of the evidence presented at trial was derived from

independent legitimate sources except for the testimony of Ralph Strafaci, Appellant's accountant. With respect to Strafaci's testimony, Appellant contends that the Government learned or confirmed the identity of Strafaci as a result of Appellant's immunized testimony. Appellant concedes that the Government was aware of Strafaci's name and profession prior to his immunized testimony but argues instead that the immunized testimony caused the Government to focus on Strafaci. We disagree.

It is uncontroverted that the Government learned about Strafaci long before Appellant's Grand Jury testimony. Strafaci was present at Appellant's office when the Government executed the April 1986 search warrant. At that time, Anthony Valenti, a criminal investigator for the United States Attorney's office, was told by Strafaci that he was the accountant for Appellant's corporations. Valenti gave Strafaci a card and told him that he should have a lawyer call him. Shortly thereafter, Strafaci's lawyer contacted Valenti.

In addition, during a January 1987 court appearance (six months prior to Appellant's first Grand Jury appearance), the Government referred to Strafaci as Appellant's accountant and indicated that Strafaci had turned documents over to Appellant's attorneys at Appellant's direction. Finally, Strafaci's name appears on various documents produced by Appellant prior to his immunized testimony in response to the Grand Jury subpoenas.

Hence, the Government was clearly aware of Strafaci and his possible involvement in or knowledge of the fraudulent scheme before he was identified during Appellant's Grand Jury testimony. The record thus sup-

ports the district court's finding that Strafaci's testimony at trial was derived from independent legitimate sources. This finding was not clearly erroneous; therefore, we cannot disturb the finding of the district court.

Appellant also contends that the Government made indirect use of his immunized testimony at trial. The gist of this argument is that the Government used Appellant's immunized testimony to (i) shape and focus the questioning of witnesses and (ii) ascertain Appellant's demeanor.[2]

Our analysis of Appellant's "indirect use" argument ends where it begins—with our holding in *United States v. Mariani*, 851 F.2d 595 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1654 (1989). In *Mariani*, we declined to follow the reasoning utilized in other circuits that would "foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial." *Id.* at 600.[3]

---

2 Appellant claims that Government investigator Valenti asked the Assistant United States Attorney ("AUSA") who examined Appellant before the Grand Jury how he reacted to questioning, how many times he left the room to speak with his attorney, and the like. Evidently, the AUSA told Valenti that Appellant came across as a "wiseguy."

3 The reasoning we rejected in *Mariani* had its genesis in *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973). In *McDaniel*, the Eighth Circuit suggested that it would be impermissible for an AUSA to use immunized testimony "in some significant way short of introducing tainted evidence. Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *Id.* at 311 (citations omitted). At least one other circuit has adopted this reasoning. *See United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983).

(footnote continued)

As the district court recognized, our holding in *Mariani* controls and is dispositive here. To the extent the Government's thought process or questioning of witnesses may have been influenced by Appellant's immunized testimony, we hold that any such use was merely tangential and was therefore not a prohibited use.

As for Appellant's claim that his immunized testimony served to expose his "wiseguy" demeanor under questioning, Appellant did not testify at trial; thus, his demeanor was never put in issue. Even if the Government assumed that Appellant would not testify at trial (based on Appellant's "wiseguy" demeanor before the Grand Jury), such judgments cannot be considered a "use" of Appellant's immunized Grand Jury testimony. *Mariani*, 851 F.2d at 601.

We conclude that the district court properly rejected Appellant's claim that the Government made use of his immunized testimony at trial. The record supports the district court's finding that the Government demonstrated an independent source for all the evidence introduced at trial, and our decision in *Mariani* forecloses Appellant's claim that the Government made indirect use of his immunized testimony.

B

We now turn to Appellant's claim that the indictment was tainted by the Government's use of his immunized testimony. We need not examine the specifics of Appel-

---

We recognize that *Mariani* is in conflict with some of our sister circuits. Nevertheless, *Mariani* is the law of this circuit, and we decline to accept Appellant's invitation that we reconsider the position we took in *Mariani*.

lant's allegations of misuse. Even if we assume, for the sake of argument, that the Government did misuse Appellant's immunized testimony, he would not be entitled to a dismissal of the indictment.

It is fundamental in our system of criminal justice that "an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence." *United States v. Washington*, 431 U.S. 181, 185 n.3 (1977) "(citations omitted)". The Supreme Court has consistently recognized this rule as applying to claims that an indictment was based on evidence obtained in violation of the privilege against self-incrimination. *See Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1499 (1989); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Gelbard v. United States*, 408 U.S. 41, 60 (1972); *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966); *Lawn v. United States*, 355 U.S. 339, 350 (1958). The rule has also been applied by the Second Circuit. *See United States v. James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974).

Neither the enactment of 18 U.S.C. § 6001 *et seq.* nor *Kastigar* have altered the effect of this rule. We agree with Judge Van Graafeiland's conclusion that the legislative history of 18 U.S.C. §§ 6002 and 6003 shows that "Congress did not intend that a violation of those sections would result in a *per se* constitutional injury requiring dismissal of the indictment." *United States v. Gallo*, 859 F.2d 1078, 1090 (2d Cir. 1988), (Van Graafeiland, *J.* concurring), *cert. denied sub nom. Miron v. United States*, 109 S. Ct. 2428 (1989).

Because "[t]he real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-

incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him," *Feldman v. United States*, 322 U.S. 487, 500 (1943) (Black, *J.*, dissenting), we believe that a violation of either the privilege against self-incrimination or 18 U.S.C. § 6002 requires only the suppression at trial of a defendant's compelled testimony. Accordingly, when the Government violates 18 U.S.C. § 6002 by using immunized testimony before a grand jury, generally the remedy for the violation is the suppression of the tainted evidence at trial, not a dismissal of the indictment.[4]

Since, in this case, the appropriate remedy for the use of immunized testimony before a grand jury is the suppression of the tainted evidence at trial, the district court properly denied Appellant's motion to dismiss the indictment. As discussed more fully above, the Govern-

---

4 Our holding on this score is not intended to alter in any fashion the two narrow exceptions to the general rule that facially valid indictments may not be challenged by allegations that the grand jury heard immunized testimony or otherwise tainted evidence. One exception we have applied is when the defendant testifies under immunity before the same grand jury returning the indictment or when the immunized testimony is placed before the indicting grand jury. In such cases, we have held that the indictment must be dismissed. *See, e.g., United States v. Tantalo*, 680 F.2d 903, 909 (2d Cir. 1982); *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976). The other exception we have recognized is when the government concedes that the indictment rests almost exclusively on tainted evidence. In that situation, we have held that a dismissal of the indictment is not an abuse of discretion. *See United States v. Tane*, 329 F.2d 848, 854 (2d Cir. 1964).

Neither of these exceptions apply to the instant appeal. The Grand Jury that heard Appellant's immunized testimony was *not* the same Grand Jury that indicted Appellant, and there is nothing in the record which suggests that his testimony was placed before the indicting Grand Jury. Moreover the Government has not conceded (nor has Appellant alleged) that the indictment rested almost exclusively on tainted evidence. This is not surprising, as the record would not support such a concession or allegation.

ment did not use, either directly or indirectly, any of Appellant's immunized testimony at trial. Consequently, because there was no use of any immunized testimony at trial (and therefore no tainted evidence that was subject to suppression), any misuse of the immunized testimony which may have occurred before the indicting Grand Jury was rendered harmless. As Judge Winter observed for the majority in *United States v. Gallo*, 859 F.2d at 1084, "[w]hile it is of utmost importance that the government respect and scrupulously observe restrictions on the use of immunized testimony, I see no reason to set aside an otherwise valid conviction because of an error that had no effect on the course of events." In other words, no harm, no foul.[5]

---

5 As an alternative basis for its denial of Appellant's motion to dismiss the indictment, the district court concluded that in light of the petit jury's guilty verdicts, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt. This conclusion was based on the Supreme Court decision in *United States v. Mechanik*, 475 U.S. 66 (1986). In *Mechanik*, the Court addressed the issue of whether a judgment of conviction should be reversed because two witnesses testified in tandem before the grand jury in violation of Federal Rule of Criminal Procedure 6(d). The Court recognized that Rule 6(d) "protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty," and that violations of Rule 6(d) "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." *Id.* at 70. However, the Court concluded:

> But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Id. "(footnotes omitted)."

(footnote continued)

IV

The district court did not err in denying Appellant's motion to dismiss the indictment. The Government did not use, directly or indirectly, Appellant's immunized testimony at trial. Even assuming that the Government did misuse the immunized testimony before the Grand Jury, Appellant was not entitled to have the indictment dismissed.

Judgment affirmed.

The district court concluded that this reasoning was equally applicable to the instant case. Appellant takes issue with this conclusion and argues that the Supreme Court did not intend that its *Mechanik* decision be given such a broad scope. The Government contends that the *Mechanik* harmless error logic ought to be extended to cases such as the one at bar.

Since we conclude for other reasons that the district court did not err in denying Appellant's motion to dismiss the indictment on the grounds of alleged misuse of Appellant's immunized testimony before the Grand Jury, we need not and do not express any opinion as to how far the *Mechanik* rule extends. We leave that issue for another day.

UNITED STATES OF AMERICA,

Plaintiff,

-against-

BARTHOLOMEW RIVIECCIO,

Defendant.

No. 88 CR 283 (S-2) (ERK).

United States District Court,
E.D. New York

Sept. 5, 1989.

MEMORANDUM & ORDER

KORMAN, District Judge.

On May 5, 1988, a grand jury sitting in the Eastern District of New York returned a four count indictment against the defendant Bartholomew Rivieccio. A superseding indictment was returned on July 21, 1988, and a second superseding indictment, containing twenty-nine counts, was returned on November 3, 1988. All three indictments were returned by a grand jury impanelled on February 1,

1988.

The indictments charged Rivieccio with fraudulently obtaining over ten million dollars in loans from the Hyfin Credit Union and an additional seventeen million dollars in loans from the Chemical Bank. The initial four count indictment involved only charges arising out of the Chemical Bank loan. The first superseding indictment added additional counts relating to the Hyfin Credit Union loans and the last superseding indictment made language changes in some of the counts relating to the Hyfin Credit Union loans.

The defendant did not testify before the grand jury that returned the original and two superseding indictments. The defendant did appear before another grand jury for the purpose of producing corporate documents of which he was the

custodian. This testimony was given after he had invoked the privilege against self-incrimination and after he had been ordered to testify. The order compelling his testimony was entered pursuant to 18 U.S.C. §6002 (1985) which provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case...."[1]

---

[1] The order was entered before the Supreme Court held in Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), that the custodian of corporate records could not assert the privilege against self-incrimination in response to a subpoena to produce corporate records and was, therefore, not entitled to the limited use immunity provided by 18 U.S.C. §6002. 108 S.Ct. at 2995. Under the holding in Braswell, an exclusionary rule apparently implied from the Fifth Amendment would provide the witness with the protection to which he was entitled: "[I]n a criminal prosecution

(continued...)

On October 25, 1988, a week before jury selection was scheduled to commence, the defendant belatedly filed a number of pretrial motions. One of these sought an order "dismissing the indictment on the grounds that the government has violated Mr. Rivieccio's rights or privileges against self-incrimination guaranteed to him by the Fifth Amendment . . . because Mr. Rivieccio was compelled to testify before a Grand Jury herein, and the information obtained thereby has been illegally used against him. United States v. Hinton, 543 F.2d 1002 [(2d Cir. 1976)], Kastigar v. United States, 406 U.S. 441 [92 S.Ct. 1653, 32 L.Ed.2d

---

[1](...continued)
against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian." Id.

212] (1972)." Letter of John A. Jasilli, October 25, 1988, at 2.

Because the primary focus of the pre-trial hearing mandated by Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) is on the source of the evidence the government proposes to use at trial, id. at 461, 92 S.Ct. at 1665, rather than on the evidence before the grand jury, it seemed appropriate to delay the hearing on the defendant's eleventh hour motion so that the issue whether his Fifth Amendment rights were infringed could be determined with the aid of a fully developed trial record. See United States v. Williams, 644 F.2d 950, 952-53 (2d Cir. 1981).

The defendant now stands convicted of the multi-million dollar fraud of which he was accused. A post-trial hearing was held to determine whether

any evidence used against the petitioner at trial was derived in any way from his compelled testimony. At such a hearing, "[o]ne raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar, 406 U.S. at 461-62, 92 S.Ct. at 1665; United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510 (1966). At the hearing here, it was conceded that all the evidence introduced at trial, with the exception of the testimony of one witness, Ralph Strafaci, was derived from "legitimate independent sources."

The defendant argued that the United States Attorney learned about Ralph Strafaci from the testimony given

by the defendant and that, even if the United States Attorney knew of Ralph Strafaci prior to the defendant's grand jury appearance, it was the defendant's testimony that caused the prosecutor to "focus" on Strafaci. The evidence, however, clearly demonstrates that Mr. Strafaci's identity, his role as the defendant's accountant, and his usefulness as a witness, were known to the United States Attorney prior to the defendant's appearance before the grand jury.

During the Kastigar hearing, Anthony Valenti, a criminal investigator on the staff of the United States Attorney, testified that on April 9, 1986, prior to the defendant's appearance before the grand jury, he had encountered Strafaci at the Bart Construction and Development Company when he executed a search warrant for

those premises: "Mr. Strafaci was doing some work at the desk and I asked him who he was, he identified himself and he said that he was the accountant for the corporations." Tr.7, March 17, 1989.

Mr. Valenti's testimony is corroborated by the transcript of a proceeding before Judge Glasser on January 9, 1987, some six months before the defendant testified before the grand jury. The issue there was a dispute over subpoenas issued for the books and records of seventeen real estate corporations through which the defendant transacted business and through which loans from Hyfin were funnelled. In the course of the proceeding, the Assistant United States Attorney told Judge Glasser:

> Add to that a statement by an attorney by the name of Ben Fonti, and the best spelling I have is F-O-N-T-I, which

> was made approximately a month ago in a telephone conversation with Assistant United States Attorney Michael Gold. Mr. Fonti is an attorney for Mr. Strafaci, who is the accountant for Bart Rivieccio. During the course of the conversation, Mr. Fonti advised A.U.S.A. Gold that all of Rivieccio's [corporate] documents were turned over at Rivieccio's directions by Strafaci, the accountant to the law firm of Kostelanetz and Ritholz.
>
> * * * *
>
> Whatever documents were important enough to be maintained in the files of Mr. Rivieccio's accountant, were turned over to the attorneys for Mr. Rivieccio at his directions.

Tr. 10, 11, 12 January 9, 1987.

The evidence plainly establishes that the United States Attorney knew the identity of Ralph Strafaci and the significance of his role before the defendant told the grand jury that Ralph Strafaci "did accounting and did the tax work for all the different corporations." Exh. 3500-4, at 11.

While it is true that Strafaci was not called to testify before the grand jury until April, 1988, some nine months after the defendant testified, there was simply nothing in the defendant's testimony before the grand jury (which only repeated what Strafaci had earlier himself told Valenti and what Strafaci's attorney had earlier told the same Assistant United States Attorney who questioned the defendant) that would have caused the United States Attorney to "focus" on Strafaci.

The defendant's only other claim with respect to the impermissible use of his testimony at trial relates to the admission Mr. Valenti candidly made during the post-trial hearing that, after the defendant testified before the grand jury, Mr. Valenti asked the Assistant United States Attorney how the defendant "reacted to questioning,

what he was like so that later on down the road certain decisions, strategic decisions might be important." Specifically, Valenti, was interested in how "did he react to questions. How many times did he go out to talk to his lawyer, stuff like that, that's all." Tr.18-19, April 13, 1989.

In United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988), cert. denied, __ U.S. __, 109 S.Ct. 1654, 104 L.Ed.2d 168 (1989), the Court of Appeals declined to follow reasoning that would "foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial." This holding is dispositive here. The defendant did not take the stand and any possible

advantage derived from hearing about the kind of witness he would make was not put to any use. See United States v. Gallo, 863 F.2d 185, 190 (2d Cir. 1988), cert. denied, __ U.S. __, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989).

Because the United States Attorney has demonstrated an independent source for all the evidence introduced at trial, the defendant's motion is directed primarily to evidence before the grand jury. The essence of his claim is that, even if his conviction is based on evidence that has an independent source and even if a new indictment could be obtained on the basis of the untainted trial record, the conviction must nevertheless be set aside and the present indictment must be dismissed because some of the evidence before the grand jury was tainted.

DISCUSSION

The threshold issue is whether a defendant, who has been convicted after a trial at which all of the evidence was untainted, should be permitted to obtain post-trial dismissal of the indictment on the ground that some of the evidence before the grand jury was tainted. There are two separate lines of authority that suggest that the defendant is foreclosed from "pick[ing] over the evidence" before the grand jury for this purpose. United States v. Remington, 208 F.2d 567, 574 (2d Cir. 1953), cert. denied, 347 U.S. 913, 74 S.Ct. 476, 98 L.Ed.2d 1069 (1954) (L. Hand, J., dissenting).

The defendant's motion to dismiss collides first with what Chief Justice Burger has described as "a line of cases in this Court holding that an indictment returned by a properly

constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence." United States v. Washington, 431 U.S. 181, 185 n.3, 97 S.Ct. 1814, 1818 n.3, 52 L.Ed.2d 238 (1977). The earliest of those cases is Holt v. United States, 218 U.S. 245, 248, 31 S.Ct. 2, 4, 54 L.Ed. 1021 (1910). There the defendant alleged that his coerced confession, which had been excluded from evidence at trial, had been offered into evidence before the grand jury and that aside from this confession "there was very little evidence against the accused." Id. at 248, 31 S.Ct. at 4.[2] In declining to

---

[2] The basis for Holt's objection to the use of his confession appears in his brief in the Supreme Court. There he argued:

> In the case at bar it is obvious, as the court below found, that the alleged

(continued...)

even consider the issue whether the district court abused its discretion in rejecting the defendant's motion to

---

[2](...continued)
confession of guilt by the plaintiff in error, Holt, which was placed before the grand jury, was involuntary. The fact that his involuntary testimony against himself was placed before the grand jury through an intermediary and was used by the grand jury in returning an indictment against him, we believe to be the same in principle as if he had been compelled to personally go before the grand jury and give the same testimony. To uphold an indictment against the plaintiff in error, Holt, is for this high court to encourage the creation of an inquisitorial body of one or more person whose duty it shall be to wring from the unwilling lips of an accused person by promise, torture or fear, self accusations which may then be laid before the grand jury as a basis for placing such person in jeopardy.

Brief for Plaintiff in Error at 24, Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) (No. 474).

quash the indictment, Justice Holmes wrote:

> All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of criminal practice would be enhanced if indictments could be upset on such a ground.

Id. at 249, 31 S.Ct. at 5.

The Supreme Court has consistently adhered to the holding in Holt particularly as it applies to claims by the defendant that the grand jury heard evidence obtained in violation of the privilege against self-incrimination. In Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958), it held that the defendants were not entitled to a hearing to determine whether the grand jury that indicted them heard evidence derived from materials they had been forced to produce before another grand jury in

violation of the privilege against self-incrimination. After reaffirming the holding in Holt, the Supreme Court observed:

> It should be necessary to say that we are not here dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the right to decline to give incriminating testimony in legal proceedings or to suppress the direct or derivative use at the trial of evidence illegally obtained. We deal here only with the question whether petitioners, in the circumstances of this case, were entitled to a preliminary hearing to enable them to satisfy their unsupported suspicions that the 1953 grand jury that returned this indictment made direct or derivative use of the materials which they produced before the 1952 grand jury. We hold that they were not.

Id. at 350, 78 S.Ct. at 318.

Again, in United States v. Blue, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966), the defendant unsuccessfully argued that an

indictment should be dismissed on the ground that the prosecution had obtained evidence in violation of the defendant's privilege against self-incrimination. The Supreme Court observed that, even if "tainted evidence was presented to the grand jury . . . our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether." 384 U.S. at 255 n.3, 86 S.Ct. at 1419 n.3 (citing Lawn and Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956)). This very language was again cited in Gelard v. United States,408 U.S. 41, 60, 92 S.Ct. 2357, 2367, 33 L.Ed.2d 179 (1972), where the Supreme Court observed:

> The "general rule," as illustrated in Blue, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence

> in violation of the [law]," even if the "tainted evidence was presented to the grand jury."

Similarly, in United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), Lawn was again cited in support of the principle that:

> [T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, Costello v. United States, [350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956)], Holt v. United States, 218 U.S. 245 [31 S.Ct. 2, 54 L.Ed.2d 1021] (1910); or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, Lawn v. United States, 355 U.S. 339 [78 S.Ct. 311, 2 L.Ed.2d 321] (1958).

Id. at 344-45, 94 S.Ct. at 618. More recently, the Supreme Court cited Lawn for the broad proposition "that even the grand jury's violation of the

defendant's right against self-incrimination does not trigger the Grand Jury Clause's right "not to be tried." Midland Asphalt Corp. v. United States, __ U.S. __, 109 S.Ct. 1494, 1499, 103 L.Ed.2d 879 (1989).

While the use of immunized testimony before the grand jury has been held to violate 18 U.S.C. §6002, United States v. Hinton, 543 F.2d 1002, 1009 (2d Cir. 1976), there is no indication that Congress intended to alter the traditional rule and provide a remedy for that violation which would be "enforceable [sic] by an individual." S.Rep. No. 1097, 90th Cong., 2d Sess. 106, reprinted in 1968 U.S. Code Cong. & Admins. News, 2112, 2953.[3] On the contrary, because

---

[3] S.Rep. No. 1097 sets out the legislative history of 18 U.S.C. §2515 and is of particular significance in explaining the rationale for denying a (continued...)

"[t]he real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him," Feldman v. United States, 322 U.S. 487, 500, 64 S.Ct. 1082,. 1088, 88 L.Ed. 1408 91944) (Black, J.,

---

[3](...continued)
remedy even where an explicit statutory exclusionary rule has been violated. Section 2515 provides that no "wire or oral communication . . . and no evidence derived therefrom may be received in evidence in any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter." The legislative history, however, makes clear that the remedy for the violation of §2515 is a motion to suppress evidence at trial: "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable [sic] by an individual. (Blue v. United States, [U.S. v. Blue], 384 U.S. 251 [86 S.Ct. 1416 , 16 L.Ed.2d 510] (1965 [1966]). There is no intent to change this general rule." S.Rep. No. 1087, 90th Cong. 2d Sess. 106, reprinted in 1968 U.S. Code Cong. & Admin. News, 2112, 2195 (emphasis supplied).

dissenting),[4] the suppression of the defendant's compelled testimony at trial is all that the Self-Incrimination Clause or Section 6002

---

[4] As Professor Levy has written:

> [The privilege against self-incrimination] became . . . one of the ways of fairly determining guilt or innocence, like trial by jury itself; it became part of the due process of the law, a fundamental principle of the accusatorial system. The right implied a humane or ethical standard in judging a person accused of crime, regardless how heinous the crime or strong the evidence of guilt. It reflected consideration for the human personality in that respect, but it also reflected the view that society benefited by seeking his conviction without the aid of his involuntary admissions. Forcing self-incrimination was thought not only to brutalize the system of criminal justice but to produce weak and untrustworthy evidence.

Leonard W. Levy, The Origins of the Fifth Amendment 332 (1968).

requires.[5] As Judge Van Graafeiland recently concluded, the legislative history of 18 U.S.C. §§ 67002 and 6003 shows that "Congress did not intend that a violation of those sections would result in a per se constitutional injury requiring dismissal of the indictment." United States v. Gallo, 859 F.2d 1078, 1090 (2d Cir. 1988), cert. denied sub nom. Miron v. United States, __ U.S. __, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989) (Van Graafeiland, J., concurring.) Instead, "the remedy for violation of the proposed law would be suppression of tainted evidence, not dismissal of the indictment." Id.[6]

---

[5] 18 U.S.C. §6002, "which operates after a witness has given incriminatory testimony" is intended to assure that his "compelled testimony can in no way lead to the infliction of criminal penalties," Kastigar, 406 U.S. at 461, 92 S.Ct. at 1665.

[6] The Court of Appeals in Hinton suggested that dismissal was the (continued...)

The holdings of the Court of Appeals for the Second Circuit likewise reject the remedy of dismissal even where the grand jury has heard evidence obtained in violation of the constitution or admitted in contravention of some privilege. United States v. Myers, 634 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); United States v. Amrep Corp., 560 F.2d 539,. 547 (2d Cir. 1977), cert. denied, 434 U.S. 1015, 98 S.Ct. 731,. 54 L.Ed.2d 759 91978); In re Millow, 529 F.2d 770, 741 (2d Cir. 1976); United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972). The only

---

[6](...continued)
appropriate remedy there because of the unusual circumstances of that case. 543 F.2d at 1008 n.7.

significant points of departure are cases in which the indictment rested solely on tainted evidence, United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964); United States v. James, 493 F.2d 323, 326 (2d Cir.), cert. denied, 419 U.S. 849, 95 S.Ct. 87, 42 L.Ed. 2d 79 (1974), or cases in which a defendant was indicted by the same grand jury before which he gave immunized testimony. Untied States v. Hinton, 543 F.2d 1002 (2d Cir. 1976). See also United States v. Tantalo, 680 903, 909 (2d Cir. 1982). United States v. Anzalone, 555 F.2d 317, 319 (2d Cir. 1977), cert. denied, 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 760 (1978); Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973); but cf. United States v. Dornau, 419 F.2d 473, 481 n.15 (2d Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111

(1974).

The defendant here relies on the exception to the general rule marked by the holding in United States v. Hinton. There, the Court of Appeals held that, "as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced." Accordingly, in exercise of its "supervisory power," the Court of Appeals reversed the judgment of conviction with instructions that the indictment be dismissed. Id. at 1010.

The Court of Appeals distinguished Hinton from the "cases since Kastigar in which appellate courts were faced with the claim that evidence was

improperly derived from immunized testimony, or that the immunized testimony was itself improperly used," because "[n]one of them involved the situation where the same grand jury which heard a witness's testimony returned an indictment against that witness based upon facts about which the witness testified." Id. at 1008-09. The facts in Hinton were distinguished from Lawn on similar grounds:

> Lawn 'involved two successive grand juries, the first of which heard defendants' testimony and received their records, and the second of which returned the indictment upon which they were tried. In direct contrast to the instant case, the defendants in Lawn "had no reason, beyond suspicion, to believe that the [second] grand jury considered any of the materials produced by petitioners before the [first] grand jury." 355 U.S., at 349-49, 78 S.Ct., at 317. Where the grand jury which hears the witness's testimony and the grand jury

> which indicts is the same grand jury, as here, consideration of the immunized testimony by that jury is a virtual certainty.

Id. at 1008 n.7.

Unlike the defendant in Hinton, however, the defendant did not allege that he testified before the same grand jury that indicted him. The pre-trial motion he filed was based on nothing more than "suspicion" that improper use was made of testimony that he gave before another grand jury almost a year earlier. Whether that suspicion has now been confirmed is beside the point. If the pre-trial motion should have been denied without a hearing, the fact that the defendant was given broad latitude to "pick over the evidence" before the grand jury, so that the record would be complete, does not entitle him to any relief at this point.

On the contrary, the fact that the defendant has been tried and convicted on an untainted record provides another, albeit "narrower," ground for denying that motion to dismiss the indictment. United States v. Mechanik, 475 U.S. 66, 72 n.2, 106 S.Ct. 938, 943 n.2, 89 L.Ed.2d 50 (1986). In Mechanik, the Supreme Court addressed the issue whether a judgment of conviction should be reversed because two witnesses testified in tandem before the grand jury. The Court of Appeals had held that the simultaneous presence of those witnesses violated Fed. R. Crim. P. 6(d) and reversed the conviction. The Supreme Court,however, concluded that the violation of Rule 6(d) was not one which justified reversal of a judgment of conviction. Rule 6(d) was intended to assure that a defendant not "be required to defend

against a charge for which there is no probable cause to believe him guilty" by insulating the grand jurors from "'undue influence that may come with the presence of an unauthorized person.'" Id. at 70, 106 S.Ct. at 941.

While the "error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict . . . the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." Id. Accordingly, the Supreme Court observed, "[m]easured by the petit jury's verdict . . . any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." Id. This

reasoning is equally applicable here.

One of the purposes of 18 U.S.C. §6002, is to assure that the grand jury's decision to indict is not influenced by evidence derived from the compelled testimony of the defendant. United States v. Hinton, 543 F.2d at 1009. Whether evidence derived from the defendant's compelled testimony here affected the grand jury's determination to indict, it is clear that the petit jury's subsequent guilty verdict was based on evidence derived entirely from legitimate independent sources. This verdict means that there was probable cause to believe that the defendant was guilty uninfluenced by evidence derived from his compelled testimony. Here, as in Mechanik, '[m]easured by the petit jury's verdict . . . any error in the grand jury proceeding connected with the charging

decision was harmless beyond a reasonable doubt." Mechanik, 475 U.S. at 70, 106 S.Ct. at 942.

Moreover, even if the defendant was entitled, prior to trial, to vindicate his right to a charging decision by the grand jury uninfluenced by the evidence derived form his immunized testimony, "there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial." Mechanik, 475 U.S. at 71, 106 S.Ct. at 942. As the present Chief Justice continued in his opinion for the Court in Mechanik:

> [The defendant] will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him. In courtroom proceedings as elsewhere, "the moving finger writes; and, having writ, moves on." Thus reversal of a conviction

> after a trial free from reversible error cannot restore to the defendant whatever benefit might have accrued to him from a trial on an indictment returned in conformity with Rule 6(d).

Id.

The force of this reasoning is not diminished by the fact that the hearing on the defendant's pre-trial motion was deferred until after trial. The defendant's claim that somehow "it would be wrong" to preclude post-trial consideration of the merits of his motion under these circumstances, Tr.65, May 30, 1989, suggests an element of unfairness that is simply not present here. The disposition of the pre-trial motion was not deferred in order to deprive the defendant of a remedy to which he would otherwise have been entitled. More significantly, if the defendant's pre-trial motion to dismiss the indictment

has been granted, he would have been reindicted and convicted. The position he would have been in is precisely the same one he is in now except that he would have been deprived of the opportunity to argue that his conviction should be reversed because of the errors in the grand jury proceeding of which he now complains. Indeed, as a practical matter, the only reason a defendant has to press a pre-trial motion based on a curable error in the grand jury proceeding is the hope that it will be erroneously denied or deferred, thereby setting the stage for the reversal of a subsequent conviction. The last thing a defendant wants is a new untainted indictment before trial. This may explain why the defendant here waited until jury selection to make a motion he contemplated making even before the

indictment was returned.

Mechanik put an end to such gamesmanship by holding that post-conviction review should be limited to those claims that bear on the outcome of the trial and that claims of error in grand jury proceedings that are not correctly resolved before conviction should be viewed as harmless per se. Lopez v. Riley, 865 F.2d 30, 33 (2d Cir. 1989). While this case does not appear to come within any of the limited exceptions contemplated by Mechanik, 475 U.S. at 70 n.1, 106 S.Ct. at 942 n.1, the Court of Appeals has suggested that Mechanik may not preclude post-trial review of the claims asserted in the defendant's pre-trial motion. United States v. Helmsley, 864 F.2d 266, 270 92d Cir. 1988), cert. denied, __ U.S. __, 109

S.Ct.2063, 104 L.Ed.2d 628 (1989).[7] Such post-trial review, however, avails the defendant little here. Because the defendant was not indicted by the same grand jury that heard his immunized testimony, he would be entitled to prevail on his pre-trial motion only if he could show that the grand jury did not have before it any other competent evidence to support the indictment. United States v. Tane, 329 F.2d 848,

---

[7] In United States v. Helmsley, the Court of Appeals dismissed an appeal from a pre-trial order denying a motion to dismiss an indictment. The suggestion in Helmsley "that defendant may raise her allegations of grand jury abuse of process after trial," 864 F.2d 270, may have been a concession that the Court of Appeals felt was required to avoid the necessity of sanctioning pre-trial appellate review of all orders involving grand jury abuse of process. The subsequent holding of the Supreme Court in the Midland Asphalt case, however, establishes that pre-trial appellate review of such orders is not an inevitable consequence of denying post-trial review of such claims. Midland Asphalt, 109 S.Ct. at 1498.

853 (2d Cir. 1964). See United States v. Myers, 635 F.2d 932, 941 n. 10 (2d Cir.), cert. denied, 449 U.S. 956, 101 S.Ct. 365, 66 L.Ed.2d 221 (1990); United States v. James, 493 F.2d 323, 326-27 (2d Cir.), cert. denied, 419 U.S. 849, 95 S.Ct. 87, 42 L.Ed.2d 79 (1974); Jones v. United States, 342 F.2d 863, 871 (D.C. Cir. 1964) (en banc).[8]

---

[8] In United States v. Kurzer, 554 F.2d 511 (2d Cir. 1976), without discussing the propriety of the remedy of dismissal, the Court of Appeals reversed a pre-trial order dismissing an indictment and remanded a case to the district court for further proceedings relating to the circumstances that induced a critical witness to provide testimony which led to the indictment of the defendant. While the remand was premised on the assumption that a dismissal was warranted if the decision of the witness to testify was a consequence of the defendant's immunized testimony, it appears that Kurzer was a case in which the indictment rested solely on tainted evidence. Id. at 514. Under such circumstances, the dismissal of the indictment would clearly be appropriate. United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964).

This standard differs from that used to determine whether a judgment of conviction should be reversed because of the admission of illegally obtained evidence at trial. Unlike a judgment of conviction, which will be reversed if there is a reasonable possibility that the evidence complained of might have contributed to the conviction, Chapman v.California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), an indictment will not be dismissed even if the evidence may have affected the decision to indict. As Judge Learned Hand explained:

> This has been the rule, in spite of the obvious fact that the same reasoning by which courts upset the verdict of a trial jury, applies as much to the finding of an indictment: i.e., the incompetent evidence may have furnished the makeweight that turned the scale. The answer has ordinarily been that a grand jury need only be satisfied that there is reasonable

> ground to suppose the accused guilty; and that an indictment is only an accusation, which must be followed by a trial at which all incompetent evidence will be winnowed out. Even as res integra, I should think the same. There are no few occasions when it is possible for the accused to get access to the proceedings of a grand jury, that an opposite rule would at best work capriciously; and in any event the answer depends upon whether the hindrance to the effective punishment of crime by allowing the accused to pick over the evidence does not outweigh any injustice he may suffer, if that privilege be denied him.

United States v. Remington, 208 F.2d 567, 574 (2d Cir. 1953), cert. denied, 347 U.S. 913, 74 S.Ct. 466, 98 L.Ed. 1069 (1954) (L. Hand, J., dissenting).

While the Supreme Court has not approved even this limited exception to the general rule "that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on

unconstitutionally obtained evidence," United States v. Washington, 431 U.S. at 185 n.3, 97 S.Ct. at 1818 n.3, there is no suggestion here that other competent evidence before the grand jury was insufficient to sustain the indictment. Specifically, taking at face value the allegations regarding the misuse of the defendant's testimony, all of the alleged misuse did no more than serve to authenticate documents that were otherwise authenticated by other witnesses or that a grand jury would have accepted as authentic in the absence of any suggestion to the contrary.

Because the documents at issue were concededly authentic, because it is arguable whether the formal authentication of such documents is even required before the grand jury and because there was other compelling

evidence before the grand jury, the defendant has resisted the application of the somewhat more stringent test adopted by the Supreme Court for determining when otherwise cognizable errors occurring before the grand jury require the dismissal of the indictment before trial, Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228 (1988),[9] or the "harmless beyond a reasonable doubt" standard applied to a materially different alleged misuse of immunized

---

[9] The Supreme Court has never sanctioned any departure from the settled rule that claims of the kind asserted here are not cognizable. Indeed, in Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228 (1988), the Supreme Court cited United States v. Calandra, 414 U.S. 338, 344-45, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974), one of the many cases that so hold, for the proposition that an indictment valid on its face is not subject to "a challenge to the reliability or competence of the evidence presented to the grand jury." Bank of Nova Scotia, 108 S.Ct. at 2377.

testimony in United States v. Gallo, 859 F.2d at 1083.[10] Def. Memo of Law, at 15 n.6; Def. Reply Memo, at 11-12. While the defendant does argue that these tests have not been met, his inability to substantiate most of his

---

[10] In United States v. Gallo, one of the defendants, Julio Miron, argued that his immunized testimony was used in an affidavit in support of an order authorizing electronic surveillance. "[T]he parties agree that the evidence against Miron developed through the electronic surveillance authorization was the basis for his conviction." Gallo, 859 F.2d 1083. The issue was whether the use of the immunized testimony to obtain the electronic surveillance authorization was harmless because of the compelling nature of other untainted evidence submitted in support of the authorization application. The harmless beyond a reasonable doubt standard, which was applied there, was clearly appropriate because the issue was whether the conceded misuse of the defendant's immunized testimony led to evidence upon which he was convicted. Unlike Gallo, there the only misuse of the defendant's immunized testimony occurred before the grand jury and it did not lead to his conviction.

claims of misuse,[11] combined with the

---

[11] The defendant argues that Elizabeth Cataldo, who testified before the grand jury after the initial indictment was returned and who did not testify at trial, was a "tainted" witness. The United States Attorney has established an independent untainted source for the identity of Mrs. Cataldo and for the decision to call her before the grand jury. Cf. Murray v. United States, 487 U.S. 533, 108 S.Ct. 2519, 101 L.Ed.2d 472 (1988). Indeed, the record supports the testimony of Mr. Valenti at the Kastigar hearing that Ms. Cataldo was never viewed as a potential prosecution witness. On the contrary, she was called before the grand jury only to "freeze" her testimony in the event she testified as a defense witness at trial. Tr. 77-78, April 13, 1989. She did no more before the grand jury than authenticate documents which, with one exception, were authenticated by other grand jury witnesses and, without exception, were authenticated by other witnesses at trial. Tr. 53-56, May 30, 1989.

> The defendant also argues that the United States Attorney failed to segregate the transcripts of the defendant's grand jury testimony from those of other witnesses and that there is a possibility that his grand jury transcripts were left with the indicting grand jury and may have been read by the
>
> (continued...)

compelling untainted evidence before the grand jury, has forced him to argue that the indictment must be dismissed if any tainted evidence was heard by the grand jury.[12] This argument, which

---

[11](...continued)
grand jury. I credit the testimony of Assistant United States Attorney Nicholas DeFeis that he segregated the transcripts of the defendant's testimony sometime prior to the return of the first indictment when he was apprised by the defendant's attorney that a motion would be made to dismiss any indictment because of the misuse of the defendants immunized testimony.

[12] The only support for the defendant's claim of misuse is found in an answer to a leading question put to Mr. Valenti when he testified before the grand jury on the fraud charge relating to the Chemical Bank. Specifically, Mr. Valenti responded affirmatively when asked if he had determined that the net worth statements the defendant submitted to the Chemical Bank was false by "examin[ing] them in light of the documents and papers" he retrieved "either from Mr. Rivieccio personally as a result of grand jury subpoenas, or
(continued...)

[12](...continued)
other means, and the documents that were seized with search warrants at the Hyfin Credit Union." Tr. 10, April 14, 1988. The question addressed to Mr. Valenti, which inaccurately assumed that he "retrieved" documents personally from the defendant, was preceded by the following statement to the grand jury by the prosecutor:

> I am not going to ask him to identify any documents today, but he will be able to present some documents to you. He will be able to answer questions specifically, if you want to know about the source of various information, but today, as I said, it's just going to be a general overview. So when we start to present witnesses who can only testify about a small part of the case, you will be able to understand where that small part fits in.

Tr. 4, April 14, 1988.

Under these circumstances, it is unlikely that the grand jury paid the slightest attention to the reference to the defendant as the source of certain documents when it voted an indictment some three weeks later. Moreover, it is inconceivable that the grand jury's action would have been any different if, instead of referring to the defendant as the source of the

(continued...)

is contrary to prevailing cases in the Second Circuit, see, e.g., United States v. Myers, 635 F.2d at 941; United States v. James, 493 F.2d at 326; United States v. Colasurdo, 453 F.2d at 596, has been rejected as a basis for upsetting a judgment of conviction. As Judge Winter wrote in United States v. Gallo:

> Such a rule would vitiate the function of the harmless error rule. While it is of utmost importance that the government respect and scrupulously observe restrictions on the use of immunized testimony, I see no reason to set aside an otherwise valid conviction because of an error that had no effect on the course of events.

859 F.2d at 1084; see United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974,

---

[12](...continued)
documents, Mr. Valenti had simply said he obtained them from the various corporate entities. See Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 2295, 101 L.Ed.2d 98 (1988).

76 L.Ed.2d 96 (1983).

The alleged misuse of the defendant's testimony here likewise had no significant effect on the course of events. While the defendant alleges that some of the evidence heard by the grand jury that indicted him derived from his compelled testimony, he is "in substantially the same position" that he would have been in had he not testified. Kastigar, 406 U.S. at 642, 92 S.Ct. at 1665. The United States Attorney established "that all of the evidence" admitted against the defendant at trial "was derived from legitimate independent sources." Id. We know from the overwhelming and untainted evidence at trial that, had the defendant not testified, the United States Attorney wold have been able to provide ample evidence to warrant an indictment. Carelessness, rather than

necessity, resulted in the alleged misuse of his compelled testimony before the grand jury. The dismissal of the indictment, which will only occasion the return of another indictment, does not make sense as a matter of policy and is not required as a matter of law.

Accordingly, for the foregoing reasons, the motion to dismiss the indictment is denied.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of November one thousand nine hundred and ninety.

Present: Hon. ROGER J. MINER, C.J.

FRANK X. ALTIMARI, C.J.

ROBERT J. KELLEHER, D.J.*

Circuit Judges,

UNITED STATES OF APPEALS
FILED NOV 2 1990
E L A I N E B .
GOLDSMITH, CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v.- Docket No.89-1581

BARTHOLOMEW RIVIECCIO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the JUDGMENT of said District Court be and it hereby is affirmed in accordance with the opinion of this Court.

Elaine B. Goldsmith,
Clerk

BY: Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH

*Hon. Jose A. Cabranes, of the US District Court for the Central District of California, sitting by designation.

ISSUED AS MANDATE.
JAN. 16, 1991

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of January one thousand nine hundred and ninety-one.

Present: Hon. ROGER J. MINER, C.J.

FRANK X. ALTIMARI, C.J.

ROBERT J. KELLEHER, D.J.

Circuit Judges,

UNITED STATES OF APPEALS
FILED JAN 8 1991
E L A I N E B .
GOLDSMITH, CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v.- Docket No.89-1581

BARTHOLOMEW RIVIECCIO,
Defendant-Appellant.

A petition for a rehearing having been filed herein by Defendant-Appellant BARTHOLOMEW RIVIECCIO.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

No. 90-1542

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

BARTHOLOMEW RIVIECCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a defendant may secure dismissal of an indictment on the basis of a claim that the government made derivative use of immunized testimony before the grand jury.

2. Whether the government made any nonevidentiary use of petitioner's immunized testimony at his trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	14, 16
Braswell v. *United States*, 487 U.S. 99 (1988)	11
Gelbard v. *United States*, 408 U.S. 41 (1972)	6
Holt v. *United States*, 218 U.S. 245 (1910)	6
Kastigar v. *United States*, 406 U.S. 441 (1972)	4, 8, 10, 15
Lawn v. *United States*, 355 U.S. 339 (1958)	6, 12, 13
United States v. *Beery*, 678 F.2d 856 (10th Cir. 1982)	13, 14
United States v. *Blue*, 384 U.S. 251 (1966)	6, 12
United States v. *Byrd*, 765 F.2d 1524 (11th Cir. 1985)	14, 17
United States v. *Calandra*, 414 U.S. 338 (1974)	6, 12, 13
United States v. *Crowson*, 828 F.2d 1427 (9th Cir. 1987)	17
United States v. *Garrett*, 797 F.2d 656 (8th Cir. 1986)	13
United States v. *Gregory*, 730 F.2d 692 (11th Cir. 1984)	13, 14
United States v. *Hampton*, 775 F.2d 1479 (11th Cir. 1985)	13, 14
United States v. *Hinton*, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976)	6, 13
United States v. *Mariani*, 851 F.2d 595 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989)	5, 8
United States v. *Mechanik*, 475 U.S. 66 (1986)	6, 9

Cases—Continued: Page

United States v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) 16, 17
United States v. *North*, 910 F.2d 843, on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, No. 90-1337 (May 28, 1991) 12, 13, 14
United States v. *Palumbo*, 897 F.2d 245 (7th Cir. 1990) 13
United States v. *Pantone*, 634 F.2d 716 (3rd Cir. 1980) 17
United States v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983) 16, 17
United States v. *Serrano*, 870 F.2d 1 (1st Cir. 1989) 14, 18
United States v. *Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981) 12
United States v. *Washington*, 431 U.S. 181 (1977) .. 6, 12
United States v. *Zielezinski*, 740 F.2d 727 (9th Cir. 1984) 13

Constitution and regulations:

U.S. Const. Amend. V (Due Process Clause) 12, 18
18 U.S.C. 215 2
18 U.S.C. 371 2
18 U.S.C. 657 2
18 U.S.C. 1341 2
18 U.S.C. 1344 2
18 U.S.C. 6002 ..... 3, 6, 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1542

BARTHOLOMEW RIVIECCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 919 F.2d 812. The memorandum and order of the district court (Pet. App. A14-A61) are reported at 723 F. Supp. 867.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. A petition for rehearing was denied on January 8, 1991. The petition for a writ of certiorari was filed on April 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; ten counts of mail fraud, in violation of 18 U.S.C. 1341; nine counts of bribery of bank officials, in violation of 18 U.S.C. 215; one count of misapplication of credit union funds, in violation of 18 U.S.C. 657; and one count of bank fraud, in violation of 18 U.S.C. 1344. He was sentenced to concurrent five-year terms of imprisonment on each count and was ordered to pay restitution. The court of appeals affirmed. Pet. App. A1-A13.

1. The evidence at trial established that, from 1981 to April 1986, petitioner participated in a fraudulent scheme to induce the HYFIN Credit Union and Chemical Bank to finance the purchase and rehabilitation of buildings, most of which were located in Brooklyn. In order to obtain loans from the credit union, petitioner bribed some of its officers by giving them shares in corporations that owned properties involved in the scheme. The loans were improper for several other reasons as well: they were unsecured; they were made to petitioner's real estate corporations in violation of a New York law barring corporations from obtaining loans from credit unions; they exceeded the credit union's lending limits; and they were completed without the necessary paperwork. After petitioner had fallen so deeply in debt that the credit union would no longer make loans to him, he applied for and received loans from Chemical Bank without disclosing that he owed millions of dollars to the credit union. Pet. App. A3-A4.

2. In April 1986, an employee of the credit union disclosed petitioner's scheme to the government, and an investigation began. State and federal agents searched petitioner's offices and the credit union pursuant to search warrants and seized numerous documents. Shortly thereafter, three of petitioner's accomplices in the scheme, two employees of the credit union and its attorney, agreed to plead guilty to various charges, to cooperate in the investigation, and to testify at subsequent proceedings. Pet. App. A4. See Gov't C.A. Br. 11.

In June 1987, petitioner's attorneys produced documents in response to subpoenas issued by a federal grand jury investigating the financial affairs of the credit union. After receiving use immunity under 18 U.S.C. 6002, petitioner testified before the grand jury on July 2, July 9, and September 10, 1987. Although the purpose of petitioner's grand jury appearance was to authenticate the documents produced in response to the grand jury subpoenas, the scope of the questioning extended beyond the authentication of records. In particular, petitioner answered questions pertaining to, among other things, the preparation of the documents, the ownership and operation of the real estate corporations, and the identity of his associates in the project, including his accountant, Ralph Strafaci. Pet. App. A4-A5.

Petitioner was not indicted by the grand jury that heard his testimony. In February 1988, a new grand jury was impanelled, and, on May 5, the second grand jury returned an indictment against petitioner. The same grand jury returned superseding indictments on July 1 and November 3, 1988. The government did not present the 1988 grand jury with any of the transcripts of petitioner's immunized testimony before the 1987 grand jury. Pet. App. A5.

3. A week before jury selection was scheduled to begin, petitioner moved to dismiss the superseding indictment on the ground that the government had made improper use of his immunized testimony before the grand jury. The court deferred consideration of the motion until after trial. After the jury had returned its guilty verdicts, the court conducted a hearing, in accordance with *Kastigar* v. *United States*, 406 U.S. 441 (1972), to determine whether the government had made any improper use of petitioner's immunized testimony before the grand jury or at trial. Based upon the record of the hearing and affidavits submitted by the prosecutor who tried the case, the court denied the motion to dismiss. Pet. App. A14-A61.

a. Petitioner conceded at the *Kastigar* hearing that "all the evidence introduced at trial, with the exception of the testimony of one witness, Ralph Strafaci, was derived from 'legitimate independent sources.'" Pet. App. A19. Petitioner argued, however, that the prosecutor learned of Strafaci from petitioner's grand jury testimony or, at a minimum, that petitioner's testimony "caused the prosecutor to 'focus' on Strafaci." *Id.* at A20. The district court rejected that contention, concluding that the evidence "clearly demonstrate[d] that Mr. Strafaci's identity, his role as [petitioner's] accountant, and his usefulness as a witness, were known to the United States Attorney prior to [petitioner's] appearance before the grand jury." *Ibid.* The court explained that an investigator on the staff of the U.S. Attorney's Office, Anthony Valenti, met Strafaci during the search of petitioner's offices and learned at that time that Strafaci was the accountant for petitioner's corporations. *Id.* at A20-A21. The court also found that "there was simply nothing in [petitioner's] testimony

before the grand jury * * * that would have caused the United States Attorney to 'focus' on Strafaci." *Id.* at A23.

Petitioner's only other claim of trial error, the court continued, was that the government had made improper use of knowledge it had gained regarding his demeanor. Pet. App. A23. The court noted that Valenti had asked a prosecutor who had examined petitioner before the 1987 grand jury how petitioner reacted to questioning; in response, the prosecutor stated that petitioner came across as a "wise guy." *Id.* at A23-A24; see *id.* at A8 n.2. (A different prosecutor tried the case.) The district court found this claim to be precluded by *United States* v. *Mariani*, 851 F.2d 595 (1988), cert. denied, 490 U.S. 1011 (1989), a case in which the Second Circuit stated that it would not "foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial." Pet. App. A24. Moreover, the court continued, petitioner "did not take the stand and any possible advantage derived from hearing about the kind of witness he would make was not put to any use." Pet. App. A24-A25.

b. The district court then turned to petitioner's contention that the government had made improper use of his immunized testimony before the grand jury. "The essence of [that] claim," the court said, was "that, even if his conviction is based on evidence that has an independent source and even if a new indictment could be obtained on the basis of the untainted trial record, the conviction must nevertheless be set aside and the present indictment must be dismissed because some of the evidence before the grand jury was tainted." Pet. App. A25. The court rejected that contention on three alternative grounds.

First, the district court noted, this Court has repeatedly held "that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence," Pet. App. A26-A27, quoting *United States* v. *Washington*, 431 U.S. 181, 185 n.3 (1977),[1] and there was no indication that the statute authorizing grants of use immunity, 18 U.S.C. 6002, was intended to alter that principle, Pet. App. A33-A35. The district court found that petitioner was not entitled to invoke an exception to that general rule, recognized by the Second Circuit as an exercise of its "supervisory power," which requires dismissal of an indictment returned by the same grand jury before which a defendant has given immunized testimony. Pet. App. A39-A41; see *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976). Here, the district court noted, petitioner did not testify before the grand jury that indicted him. Pet. App. A41.

Second, relying on *United States* v. *Mechanik*, 475 U.S. 66 (1986), the district court found that petitioner's conviction rendered harmless any error in the proceedings before the grand jury. "Whether evidence derived from the defendant's compelled testimony here affected the grand jury's determination to indict," the court explained, "it is clear that the petit jury's subsequent verdict was based on evidence derived entirely from legitimate independent sources." Pet. App. A44. Thus, "[m]easured by the petit

---

[1] The district court cited and discussed *Holt* v. *United States*, 218 U.S. 245, 248 (1910), *Lawn* v. *United States*, 355 U.S. 339 (1958), *United States* v. *Blue*, 384 U.S. 251 (1966), *Gelbard* v. *United States*, 408 U.S. 41, 60 (1972), and *United States* v. *Calandra*, 414 U.S. 338 (1974).

jury's verdict . . . any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.* at A44-A45 (quoting *Mechanik*).

Finally, the district court concluded that even if *Mechanik* left room for post-trial review of petitioner's claim, any alleged misuse of petitioner's immunized testimony could not have affected the grand jury's decision to indict. Pet. App. A53. "[T]aking at face value the allegations regarding the misuse of [petitioner's] testimony," the court explained, "all of the alleged misuse did no more than * * * authenticate documents that were otherwise authenticated by other witnesses or that a grand jury would have accepted as authentic in the absence of any suggestion to the contrary." *Ibid.* In fact, the court continued, the fact that petitioner failed "to substantiate most of his claims of misuse, combined with the compelling untainted evidence before the grand jury, has forced him to argue that the indictment must be dismissed if any tainted evidence was heard by the grand jury." *Id.* at A55-A57.[2] The district court found that Sec-

[2] The court rejected petitioner's claim that the government learned of grand jury witness Elizabeth Cataldo from his testimony, finding that the government had established "an independent untainted source for the identity of Cataldo and for the decision to call her before the grand jury." Pet. App. A56 n.11. Similarly, the court found that the grand jury that returned petitioner's indictment was not exposed to the transcript of his testimony. *Id.* at A56-A57 n.11. The "only support for [petitioner's] claim of misuse" before the grand jury, the court found, was a single answer by investigator Valenti, in testimony before the second grand jury, which suggested, incorrectly, that petitioner had produced certain documents. *Id.* at A57-A58 n.12. The court concluded, however, that it was "inconceivable that the grand jury's action would have been different if, instead of referring to [peti-

ond Circuit cases foreclosed that contention, and it concluded that "[t]he alleged misuse of [petitioner's] testimony * * * had no significant effect on the course of events." *Id.* at A60.

4. The court of appeals affirmed, addressing in turn petitioner's claims that the government had misused his immunized testimony at trial and before the grand jury. Pet. App. A1-A13.

With respect to the trial, the court of appeals upheld the district court's finding that Strafaci's testimony "was derived from independent legitimate sources." Pet. App. A7-A8. The court found that any contention that the government had made "indirect use" of petitioner's testimony—*i.e.*, "to shape and focus the questioning of witnesses and * * * to ascertain petitioner's demeanor"—was foreclosed by *United States* v. *Mariani*, *supra*. *Id.* at A8-A9. In any event, the court added, petitioner's demeanor was never in issue since he chose not to testify at trial. *Id.* at A9.

With respect to the grand jury proceedings, the court assumed, "for the sake of argument, that the Government did misuse [petitioner's] immunized testimony" before the grand jury. It concluded, however, that even in that event petitioner "would not be entitled to a dismissal of the indictment." Pet. App. A10. The court explained that "an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence" and that neither *Kastigar* nor the federal immunity statute, 18 U.S.C. 6002, "altered the effect of this rule."

---

tioner] as the source of the documents, [the investigator] had simply said that he obtained them from the various corporate entities." *Id.* at A58-A59 n.12.

Pet. App. A10. Although the court recognized exceptions for cases in which an individual has been indicted by a grand jury that has heard his immunized testimony or in which the indictment rests "almost exclusively on tainted evidence," it found that neither exception applied to this case. *Id.* at A11 n.4. The court declined to reach the question whether *Mechanik* independently foreclosed petitioner's claim. *Id.* at A12-A13 n.5.

ARGUMENT

Petitioner contends that the court of appeals erred in its determinations (1) that the government's alleged misuse of petitioner's immunized grand jury testimony did not justify dismissal of the indictment and (2) that the alleged non-evidentiary use of that testimony at trial did not warrant reversal of his convictions. Although the Second Circuit's reasoning on the first issue conflicts with decisions of other courts of appeals, the conflict has no bearing on the resolution of this case. The second issue is a factual one on which the courts below were manifestly correct and which would not be decided differently by any other court of appeals. Further review is therefore not warranted.

1. Petitioner's challenge to the validity of his indictment presents only the question of what remedies are available for an alleged misuse of immunized testimony before the grand jury. Notwithstanding petitioner's attempts to cast the court's holding in more pejorative terms (*e.g.*, Pet. 1, 11), the court did not authorize prosecutors to use immunized testimony to secure an indictment. Rather, assuming for purposes of argument that such a violation has occurred, it held that dismissal of the indictment was not an available remedy under the circumstances of this case.

Although the court of appeals assumed *arguendo* that petitioner's immunized testimony was put to some use before the grand jury, petitioner's showing of impropriety was in fact extremely weak. After having had a full opportunity to develop his claims in a *Kastigar* hearing, petitioner was able to point to only three respects in which, he asserted, the government had made improper evidentiary use of his immunized testimony during the grand jury proceedings, and none of those claims withstands analysis.

First, he argued that, as a result of his testimony, the government had identified, or focused upon, accountant Strafaci. Pet. C.A. Br. 5, 8. The district court, however, found that there was "simply nothing" in petitioner's testimony that would have caused the government to focus on Strafaci. Pet. App. A7; see *id.* at A20-A23. Moreover, the record established that government investigator Valenti met Strafaci while executing a search warrant at petitioner's offices, long before petitioner testified. Far from overlooking Strafaci's significance, Valenti asked Strafaci to have a lawyer call him on Strafaci's behalf, indicating that Valenti had an investigative interest in Strafaci from the outset.

Second, petitioner argued that the government was "apparently [un]interested" in bookkeeper Cataldo until after she was identified in petitioner's testimony. Pet. C.A. Br. 7-8. Here again, the district court found that the government was aware of Cataldo's identity from another source before petitioner testified; that Cataldo was never viewed as a potential prosecution witness; and that, when Cataldo was called to testify before the grand jury that indicted petitioner, she merely authenticated

documents that, with one exception, had been authenticated by other witnesses.[3]

Third, petitioner complained that, in testimony before the grand jury that returned the indictment, Valenti identified petitioner as the source of certain records relevant to the case.[4] The district court acknowledged that Valenti's testimony inaccurately characterized petitioner as the source of the documents and was improper under *Braswell* v. *United States*, 487 U.S. 99 (1988). Pet. App. A57-A59 n.12. But the district court found that "it is inconceivable that the grand jury's action would have been any different if, instead of referring to the defendant as the source of the documents, [the investigator] had simply said he obtained them from various corporate entities." *Id.* at A58-A59 n.12.

On these findings, the district court set forth three reasons why petitioner was not entitled to dismissal of the indictment. It held, in the alternative, (1) that an indictment returned by a grand jury before which an immunized defendant has not testified is not subject to challenge on the ground that it rested in part on incompetent evidence, (2) that petitioner's conviction rendered any error in the grand jury harm-

---

[3] Pet. App. A56 n.11. At trial, other witnesses authenticated all of the documents Cataldo had identified. *Ibid.*

[4] Pet. C.A. Br. 13-14. Referring to false net worth statements that petitioner submitted to Chemical Bank, the prosecutor elicited the following testimony (*id.* at 14):

> [Q]: And have you examined then [*sic*] in light of the documents and papers you retrieved either from [petitioner] personally as a result of Grand Jury subpoena, or other means, and the documents that were seized with search warrants at the Hyfin Credit Union?
>
> [A]: Yes, I have.

less, and (3) that there was abundant evidence, untainted by his immunized testimony, to support the indictment.

The court of appeals chose to rest its decision exclusively on the first ground. Accord *United States* v. *Society of Independent Gasoline Marketers*, 624 F.2d 461, 473-474 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981). This Court's decisions fully support that disposition. As both of the courts below noted, this Court has established that an otherwise valid indictment "is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence." *United States* v. *Washington*, 431 U.S. at 185 n.3. Accord *United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Blue*, 384 U.S. 251 (1966); *Lawn* v. *United States*, 355 U.S. 339 (1958). *Lawn* is particularly instructive. In that case, the defendants argued that the Due Process Clause entitled them to a hearing to determine whether an indictment had been based on documents that they had been compelled to produce in violation of their privilege against compelled self-incrimination. This Court upheld the trial court's refusal to hold such a hearing, explaining that the defendants had not established a foundation for a hearing and that "an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits." 355 U.S. at 349.

It is true, as petitioner indicates, that other courts have held that an indictment is subject to dismissal if the government fails to establish an independent source for evidence submitted to the grand jury. *United States* v. *North*, 910 F.2d 843, 868-873, on rehearing, 920 F.2d 940, 947-949 (D.C. Cir. 1990),

cert. denied, No. 90-1337 (May 28, 1991); *United States* v. *Palumbo*, 897 F.2d 245, 251 (7th Cir. 1990); *United States* v. *Garrett*, 797 F.2d 656, 659-665 (8th Cir. 1986); *United States* v. *Beery*, 678 F.2d 856, 859-860, 863 (10th Cir. 1982); *United States* v. *Hampton*, 775 F.2d 1479, 1485 & n.34, 1489 (11th Cir. 1985); *United States* v. *Gregory*, 730 F.2d 692, 697-698 (11th Cir. 1984). See also *United States* v. *Zielezinski*, 740 F.2d 727 (9th Cir. 1984). Those courts have read *Calandra*, *Lawn*, and other similar cases only to foreclose inquiry into whether the grand jury was exposed to evidence that was previously obtained in violation of the defendant's constitutional rights; they have viewed reliance on a defendant's immunized testimony in a grand jury investigation as a violation that occurs in the grand jury itself. *E.g.*, *United States* v. *North*, 910 F.2d at 868-869; *United States* v. *Garrett*, 797 F.2d at 660-662; *United States* v. *Beery*, 678 F.2d at 859-860.

This distinction is elusive at best, and in any event, it is inapplicable to this case. This is not a case in which the grand jury that returned the indictment violated petitioner's rights by compelling him to testify and then relying on that testimony in its charging decision.[5] Rather, petitioner claims that the grand jury that returned his indictment was affected by the derivative use of immunized testimony that was given before a different grand jury. There is no difference in principle between that claim and an argument that a grand jury has relied on a coerced confession (or evidence derived from it) in return-

[5] The court of appeals acknowledged that its prior cases require dismissal of an indictment in that situation. See, *e.g.*, *United States* v. *Hinton*, *supra*.

ing an indictment. Both should be equally vulnerable to the principle that an otherwise valid indictment is not subject to challenge on the ground that it was based on evidence obtained in violation of a defendant's constitutional rights.

In any event, the facts of this case do not require resolution of this issue. In accordance with *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255-256 (1988), any claim that the government has made improper use of immunized testimony in securing an indictment is, at a minimum, subject to harmless error analysis. *United States* v. *North*, 910 F.2d at 873; *United States* v. *Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States* v. *Hampton*, 775 F.2d at 1489 n.51; *United States* v. *Byrd*, 765 F.2d 1524, 1529 n.8 (11th Cir. 1985); *United States* v. *Gregory*, 730 F.2d at 698; *United States* v. *Beery*, 678 F.2d at 863. After careful analysis of the particulars of petitioner's claims, the district court found that the "only support" for his contention was a single answer by a government investigator, incorrectly identifying petitioner as the source of documents produced in response to subpoena. That answer, the court concluded, could not conceivably have affected the grand jury's charging decision. Pet. App. A57-A59 n.12. The government's "overwhelming and untainted evidence at trial" established that "the United States Attorney would have been able to provide ample evidence to warrant an indictment" even without petitioner's testimony. *Id.* at A60. The facts of this case therefore do not call for review of the question whether a prejudicial misuse of immunized testimony may justify dismissal of an indictment.[6]

---

[6] This Court declined to review this question in *United States* v. *North*, No. 90-1337 (May 28, 1991).

2. Petitioner also contends (Pet. 27-29) that the court of appeals erred in its disposition of his claim that the government made indirect use of his immunized testimony at trial. The district court and the court of appeals correctly rejected that claim on these facts.

The district court noted that, as far as the trial was concerned, petitioner's only claim of nonevidentiary use was that the government had capitalized on what it learned of his demeanor during his grand jury appearances. Pet. App. A23. Valenti admitted that he asked one of the prosecutors who examined petitioner how petitioner answered questions, and was told that petitioner came across as a "wise guy." *Id.* at A8 n.2, A23-A25. The government could not possibly have made any use of that observation at trial, however, since petitioner did not testify. *Id.* at A23-A25.

The facts also contradict petitioner's unelaborated assertion that his immunized testimony was used at trial "to shape and focus the questioning of witnesses and in otherwise preparing for trial." Pet. 27. See Pet. C.A. Br. 17. The court of appeals sustained the district court's finding that none of the evidence introduced during the trial was derived from petitioner's testimony. Pet. App. A6-A8. The prosecutor who tried the case did not examine petitioner before the grand jury. Furthermore, in affidavits submitted in connection with the *Kastigar* hearing, the trial prosecutor stated that although he read one volume of petitioner's testimony and glanced at another, he did not look at the volume containing the most substantial portion of petitioner's testimony; that the volumes he did examine involved primarily the authentication of documents; and that, by the time he prepared for trial, he recalled only that petitioner

authenticated documents in the grand jury. Gov't C.A. Br. 12-13. It is impossible to conceive how the prosecutor's recollection that petitioner had authenticated documents could have assisted him in focusing and shaping evidence that was derived entirely from legitimate sources.[7]

The cases on which petitioner relies, *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), and *United States* v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983), involved far more substantial claims of nonevidentiary use. In *McDaniel*, the prosecutor read transcripts of immunized grand jury testimony in which the defendant "fully confessed his misdeeds." 482 F.2d at 311. Moreover, at the time he read the transcripts, the prosecutor was unaware that the testimony had been obtained pursuant to a grant of

---

[7] Petitioner does not seek review of the contention, which he advanced in the court of appeals, that the government made improper nonevidentiary use of his testimony before the grand jury. See Pet. i. In any event, the record establishes that, a year before petitioner testified before the grand jury, three of his accomplices in the scheme to defraud the credit union agreed to plead guilty and cooperate with the government. All three were fully debriefed before petitioner gave his immunized testimony. Petitioner was not indicted by the grand jury that heard his testimony, nor was that testimony presented to the grand jury which returned the indictment. Gov't C.A. Br. 10-13; Pet. App. A56-A57 n.11. Further, the district court rejected all of petitioner's claims of derivative use before the grand jury (except for the investigator's reference to petitioner as the source of corporate documents, which the court determined to be harmless), and it concluded that there was abundant evidence to sustain the indictment. Pet. App. A55-A61 & nn.11-12. Under the standard applied in *Bank of Nova Scotia*, those facts leave no room for a determination that any nonevidentiary use of petitioner's testimony during the proceedings culminating in his indictment had any effect on the charging decision.

immunity, and therefore "could have perceived no reason to segregate [the] testimony from his other sources of information." *Ibid.* The court concluded that, "[u]nder these circumstances," the government could not satisfy its burden of showing that the testimony was not used "in some significant way short of introducing tainted evidence," such as in "planning cross-examination, and otherwise generally planning trial strategy." *Ibid.* Similarly, in *Semkiw*, the court of appeals remanded the case to the district court for a hearing into the possibility that the trial prosecutor had discovered the defendant's defense through his access to the defendant's immunized testimony, and thus had derived an unfair advantage in preparing his case. 712 F.2d at 893-895. In the instant case, the trial prosecutor's affidavits foreclosed a similar contention.

It does not appear that *McDaniel*, *Semkiw*, or any other court of appeals decision would require reversal of a conviction in a case in which the prosecution has made "merely tangential" nonevidentiary use of immunized testimony.[8] But in any event, review of that question should await a case in which there is a concrete indication that the government has

---

[7] See *United States* v. *Serrano*, 870 F.2d at 17-18 ("a prosecution is not foreclosed merely because 'the immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial' "); *United States* v. *Pantone*, 634 F.2d 716 (3d Cir. 1980) (mere exposure of prosecutor to immunized testimony does not require reversal of conviction); *United States* v. *Crowson*, 828 F.2d 1427, 1431 (9th Cir. 1987) (assuming *arguendo* that nonevidentiary use was prohibited, but finding that the government carried its burden of showing that no such use was made); *United States* v. *Byrd*, 765 F.2d at 1532 (a violation of the privilege against compelled self-

made some nonevidentiary use of immunized testimony. See *United States* v. *Serrano*, 870 F.2d at 17 (declining to review untimely claim of nonevidentiary use on the ground that the record on appeal was "clearly inadequate to resolve this highly factual issue" and "contain[ed] none of the findings relevant to this fact-intensive issue"). Here, the prosecutor specifically denied any such use, and petitioner's claim consists entirely of an unelaborated assertion that the government nonetheless used his testimony to focus and shape evidence that was derived entirely from legitimate sources.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JUNE 1991

---

incrimination ordinarily does not occur "unless [the] use of the immunized testimony resulted in the introduction of evidence not obtained wholly from independent sources"). The D.C. Circuit reserved judgment on whether the Fifth Amendment prohibits nonevidentiary use in *United States* v. *North*, 910 F.2d at 856-860.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20580

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

(3)

NO. 90-1542

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARTHOLOMEW RIVIECCIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Alan M. Dershowitz
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, NY 10007
(212) 513-7676

Victoria B. Eiger
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

ARGUMENT.....1

CONCLUSION.....5

TABLE OF AUTHORITIES

CASES

Counselman v. Hitchcock,
142 U.S. 547 (1892).....3

Kastigar v. United States,
406 U.S. 441 (1972).....1

Murphy v. Waterfront,
Comm'n,
378 U.S. 52 (1964).....3

STATUTES AND RULES

18 U.S.C. §6002.....3

Supreme Court Rule 17.1(a).....2

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

This case presents the vital question whether an indictment derived from testimony given by a defendant under a grant of immunity is valid. The Second Circuit has held that it is because Kastigar v. United States, 406 U.S. 441 (1972), and the Fifth Amendment protect a defendant only from the use of his immunized testimony at his trial.

The Solicitor General has conceded that the Second Circuit's decision conflicts with reported decisions of the District of Columbia, Seventh, Eighth, Tenth and Eleventh Circuits, all of which have recognized that a defendant's indictment is subject to dismissal if the indictment is based

on, or derived from, testimony given by the defendant under a grant of immunity. See Brief for the United States in Opposition at 9, 12-13. On this basis alone, the case undoubtedly merits consideration by this Court on certiorari. See Rule 17.1(a) of the Rules of the Supreme Court.

The government opposes the grant of certiorari, arguing primarily that proper resolution of Petitioner's case does not necessarily turn on the issue whether the government may use an immunized witness's immunized testimony to secure an indictment against him. We are prepared to argue, on the merits, that the government is wrong. But for purposes of certiorari, it does not matter. The law today in the Second Circuit is that a defendant may be indicted on the basis of testimony which he gave under an immunity grant.

The Second Circuit's published opinion says that the Fifth Amendment, 18 U.S.C. §6002, and Kastigar v. United States, 406 U.S. 441 (1972), protect a defendant only from the use of immunized, compelled testimony at trial. (A.10-11)

Even if there were no conflict in the Circuits on this issue, the case would merit consideration on certiorari, because the Court of Appeals' ruling is in apparent conflict with Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); and Counselman v. Hitchcock, 142 U.S. 547 (1892), decisions which the government does not even bother to discuss.

In addition, the case merits consideration by this Court based on the serious impact the Second Circuit's ruling will have on prosecutors -- both

state and federal -- and on the criminal defense bar. The government argues that the Second Circuit did not authorize prosecutors to use immunized testimony to secure an indictment -- but held only that a defendant is not entitled to dismissal of the indictment where the prosecution has done just that. To the defendant, at least, there is little difference. It is the extraordinary client who would believe that, although he stands indicted based on his own testimony, he is nevertheless in "substantially the same position," Kastigar, supra, 406 U.S. at 457, he would have been in had he not testified at all.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan M. Dershowitz
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4616

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, NY 10007
(212) 513-7676

Victoria B. Eiger
Of Counsel

Dated: June 12, 1991
New York, New York